IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-8275

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STANLEY E. ADAMS, JR,
Defendant-Appellant..

Appeal from the United States District Court
for the Western District of Texas
(A-90-CR-117(1))

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and PICKERING*, District Judge.
PER CURIAM:"
AFFIRMED. See Local Rule 47.6.

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*District Judge of the Southern District of Mississippi, sitting by designation..

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-8275

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STANLEY E. ADAMS, JR.

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion), 5 Cir., ____, _____ F.2d _____

(October 15, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge and PICKERING*, District Judge.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel hearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge
Signed by Patt S. Higginbotham

*District Judge of the Southern District of Mississippi, sitting by designation.
REHG-8

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

CRIMINAL NO. A-90-CR-117(1)

MOTION TO CORRECT
PRESENTENCE INVESTIGATION REPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, STANLEY E. ADAMS, JR., through counsel, and pursuant to the Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, respectfully moves this Honorable Court for an Order striking or redacting the below-listed disputed statements from the Pre-sentence Investigation Report, which contain no indicia of reliability. As reasons and grounds therefore, the Defendant states as follows:

1. The Pre-sentence Investigation Report contains several factual inaccuracies, presumably offered by the

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government, which are not supported by evidence and, indeed, are contradicted facts, which the Defendant submits are known to the government. It is submitted that these inaccuracies, when relied upon by the Court in imposing its sentence pursuant to the Federal Sentencing Guidelines will result in a harsher and unjustified period of confinement being served by the Defendant. Further, it is submitted that these inaccuracies, when relied upon by the United States Parole Commission will result in the imposition of much higher parole guidelines for the Defendant than would otherwise be applicable.

2. The Pre-sentence Investigation Report unfortunately contains numerous erroneous, prejudicial statements that not only attempt to establish an improper dollar amount for the offense for which the Defendant should be held responsible by the United States Parole Commission for parole guidelines purposes, but which also imply that the Defendant was involved in the offense for which he has been convicted, in a much greater role than is truly the case. When taken in their entirety, the erroneous statement in the Pre-sentence Investigation Report will, the Defendant would respectfully

submit, adversely affect him not only at sentencing, but will also be relied upon by the Federal Bureau of Prisons in determining the Defendant's eligibility for various programs such as furlough, eligibility for community treatment center placement, and federal facility designation.

3. The Defendant disagrees with the majority of information set forth in the government's version of the offense as found in pages 3, 4, 5, 6 and 7 of the Pre-sentence Investigation Report. Due to a severe limitation of time, counsel is not in a position to go into as much detail as he would otherwise concerning these objections. However, the following constitutes a partial list of the matters to which the Defendant objects in the Pre-sentence Investigation Report.

A. In the "conspirators" section of the Pre-sentence Investigation Report at page 2, the first paragraph states "the direction and control." The Defendant strongly objects to this general statement as many of the actions of the alleged co-conspirators in this case were taken without knowledge, control, direction or supervision of the Defendant. Further, in his deposition, Merrick Leler testified that no one told him

to do anything improper with respect to transactions in question.

B. In the "offense conduct" of the Pre-sentence Investigation Report, the Defendant has the following objections:

1. In the second paragraph of this section, the Defendant objects to the use of the words "sham loan." Specifically, not only did Mr. Adams never cause any loans to be made, but he also never had discussions with any co-conspirators concerning the making of any type of "sham loans."

2. The Defendant objects to the statements contained in the fourth paragraph of the Offense Conduct Section. There was only one purported borrower (Reese) who brought to Lamar a purported nominee borrower (Robert Hayden Brown). Mr. Brown was not a nominee borrower as he had personal liability (as did Mr. Reese) on the DeSoto Loan. (This matter will be further discussed below). Mr. Brown

was dismissed from the instant case as a defendant by the Court as a result of a motion for judgment of acquittal.

3. The Defendant objects to the statement contained in the fourth paragraph of the offense conducts section which indicates "that some persons who acted as borrowers in this manner had no knowledge of the loan amount, interest rate or terms of repayment." If there is any evidence that this statement is accurate with respect to any loan transaction consummated by Lamar Savings, the Defendant had no knowledge of it and would not have condoned or permitted such loans to go forward had he had such knowledge. There was only one person who was purported as not knowing the loan amount. However, his first offer spelled out exactly what he expected and when the loan closed he received exactly what his offer set forth.

4. With respect to the DeSoto property

transaction, the Defendant objects to the statement contained at page 5 of the Pre-sentence Investigation Report that "he (Reese) had first acquired the land in 1983 for 5.2 million dollars and subsequently sold it to his own companies, Belgian American Investments & Trade, Inc. in 1984 for 11.6 million, and Euromont, Inc. on 6/29/85 for 18 million dollars." Belgian American Investments & Trade was not Luis Reese's company. It belonged to Hubert Flamant. Belgian American then sold the property to R. F. Partners (Reese and Flamant); the property then sold to Louis G. Reese, Inc. However, the deeds to R. F. Partners, to Euromont and to Luis G. Reese, Inc. were all recorded the same day - July 2, 1985. Further, from the point of view of the DeSoto transaction, there is no evidence that the Defendant was ever aware that Reese owned the property at the time the loan was made. Mr. Adams had never met Mr. Reese

and was not involved in structuring the transaction involving the DeSoto property. Additionally, Mr. Adams had no knowledge that Mr. Reese was using any of the funds from the sale of DeSoto to pay for the Witte Road tract and the Ponderosa Shopping Center.

5. With respect to the DeSoto Property, the Defendant controverts the losses alleged in the paragraphs found on pages 5 and 6. The property in question appraised for more than the amount that was loaned. The Defendant would also point out to the Court that co-defendant Perry was acquitted on this transaction and that there is no reason to believe that had the Defendant gone to trial that he would have been convicted of any wrong doing with respect to this loan transaction.

6. Additionally, the Defendant strongly objects to the inclusion of the DeSoto property transaction as well as the Parklane transaction

(found on page 6 of the Pre-sentence Investigation Report) in determining the amount of loss for which he should be held responsible for parole guidelines purposes. The only transaction to which the Defendant has pled guilty is the Remington House transaction which will be discussed below and it is the Defendant's position that to attempt to include him as a culpable co-conspirator and hold him responsible for alleged losses on transaction for which he has never pled guilty nor for which has he been convicted is a denial of his due process rights. The transactions in question took place without his knowledge, direction or participation.

7. The Defendant objects to the overall tenor of the Pre-sentence Investigation Report which implies that somehow his actions resulted in the failure of Lamar Savings. It is the Defendant's position that the government has neither charged or proved that Mr. Adams is

responsible for Lamar's failure. Therefore, this type of implication could have significant impact on any efforts he may later undertake with the United States Parol Commission concerning his release and/or status as a Federal Prison Inmate if he is sentenced to a term of active confinement.

8. The Defendant objects to the conclusion made in the Victim Impact Section of pages 7 and 8 of the Pre-sentence Investigation Report that the total loss which resulted from his offense activity was $9,265,829. Allowing the $9,265,829 figure to remain in the Pre-sentence Investigation Report will only serve to prejudice Mr. Adams, if not in the eyes of the court but later with the United States Parole Commission by implying that he is responsible for such a huge loss - especially in light of the fact that he has not pled guilty to or been convicted of any wrong doing in the DeSoto and Parklane Apartment transactions.

9. The Defendant controverts the alleged loss of interest of $254,246 with respect to the Parklane Apartment transaction as set forth on page 6 of the Pre-sentence Investigation Report. As discussed above, he has not pled guilty to this transaction nor is there any evidence that he knowingly participated in any wrong doing with respect to the Parklane Apartment loan. He did not approve of or know of the actions of Sidney Terry and Merrick Leler in regard to this loan.

10. With respect to the Remington House Loan transaction discussed on pages 6 and 7, the Defendant objects to the allegation that Lamar lost $785,342 in interest on this transaction. The Defendant objects to the statement contained at page 7 of the Pre-sentence Investigation Report that the Remington House apartment transaction incurred a loss of $78,750. In the V. Jay Parekh trial, the FDIC stated that there was no loss incurred to the

government as the result of the Remington House transaction. In fact, it is the Defendant's position a profit was actually made on the transaction. Additionally, the Defendant objects to the statement contained in the third paragraph at page 6 of the Pre-sentence Investigation Report that Parekh was "paid $78,750 by Lamar as an inducement for taking the property." The $78,000 fee paid to Mr. Parekh by Lamar was not an inducement for taking the loan, but instead, a brokerage fee for services rendered.

11. The Defendant objects to the statement contained at page 7 of the Pre-sentence Investigation Report that the total loss on the DeSoto, Witte and Ponderosa properties was $9,265,829.

12. The Defendant objects to the statement contained on page 7 of the Pre-sentence Investigation Report which implies that a $5,000 loss was incurred as a result of the Parklane

Apartment transaction.

13. In the evaluation section of the Pre-sentence Investigation Report at page 12, the Defendant objects to the statement that "once he and his co-conspirators realized that LSA was in trouble, they hid LSA problems form the Federal Home Loan Bank Board through a series of sham loans." As stated above, the only transaction to which the Defendant entered a plea of guilty is the Remington House loan transaction, and he vigorously objects to any allegations that indicate that he has been either found guilty or has pled guilty to a far reaching conspiracy with respect to the other loan transactions discussed in the Pre-sentence Investigation Report.

14. Under the section entitled "Sentencing Data" at page 12 of the Pre-sentence Investigation Report, the Defendant objects to an offense severity rating score of 6 and further objects to estimate of parole guidelines as

being 40-52 months. It is his position as stated above, that the alleged loss figure of $9,265,829 is based upon totally inaccurate information which has resulted in offense severity rating and the establishment of parole guidelines at a much higher level than otherwise should be the case.

15. The Defendant objects to statements found at the bottom of page 6 that indicate that with respect to the Remington House transaction that Mr. Parekh "had not submitted a loan request for this property since 1985" and that "he did not know the loan amount or the sales price." The facts are that LSA received a real estate contract including a request for a loan that was accepted by LSA in September, 1985. This contract included the loan amount of $15,750,000 and a payoff to seller of $14,654,028.49.

16. The Defendant objects to the statement of page 7 of the Report that with respect to the

Remington House transaction, Mr. Parekh did not escrow any monies for taxes on the property. Taxes for 1985 were paid by Mr. Parekh from the loan proceeds, 1986 taxes were not required to be escrow.

17. The Defendant objects to the statement concerning the $19,000 which Mr. Parekh gave to Mr. Coleman as being inaccurate. Mr. Parekh did not give $10,000 to Mr. Coleman. It was a loan that was paid back within three months. Mr. Gravelle, the FBI Agent involved in the case testified in Mr. Parekh's trial that the $10,000 was paid back in June, 1986.

WHEREFORE, for the foregoing reasons, it is respectfully prayed that an Order be issued striking and redacting each of the disputed sections of the Pre-sentence Investigation Report from the text of the Report in order that said information will not adversely affect the Defendant at sentencing, as well as with the Federal Bureau of Prisons.

Respectfully Submitted,

_____

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_____

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State Bar No. 10848000

ATTORNEYS FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 15th day of February 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

NO. A-90-CR-117(1)
Austin, Texas
February 20, 1992

TRANSCRIPT OF PROCEEDINGS
SENTENCING PROCEEDINGS

BEFORE THE HONORABLE JAMES R. NOWLIN

APPEARANCES:

For the Government:

Mr. Dan Mills
Assistant U.S. Attorney
816 Congress, Ste., 650
First City Centre
Austin, Texas

For the Defendant:

Mr. Richard Haynes and
Mr. Michael Essmyer
Attorneys at Law
4300 Scotland
Houston, Texas 77007

Mr. Jim Mattox
Attorney at Law
P.O. Box 13223
Austin, Texas 78711

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And that's the substance of our objections. And other than -- I will say that their version of the facts is considerably different than our recollection. And since we didn't have a trial, certain aspects of those things never came out. And perhaps at this point it's totally academic.

But anyway, there's quite a bit of the report on Pages 2 through 7 that we've -- don't agree with, and the second half of the review.

But other than that, it was -- we're prepared to go ahead.

THE COURT: Mr. Haynes, have you had an opportunity to review the presentence report?

MR. HAYNES: I have, your Honor.

THE COURT: Do you have any comments or corrections you want to make with regard to this report?

MR. HAYNES: If the court please, we filed a written motion to correct the presentence investigation report under Rule 32(c)(3)(D). And -- but I -- and it's multi page, and it was filed, I think, yesterday morning --

THE COURT: I've read it.

MR. HAYNES: If the court please. I don't know if it will assist the court for me to reread it, but I would like to highlight some points and perhaps get the input from counsel for the government to see if there can be some effective change made in the PSI at this time before the court announces sentence.

Sentencing Proceeding page 4

THE COURT: Al right. Go ahead.

MR. HAYNES: to supplement our position, if the court please, I would like to offer the court's consideration and as evidence in these sentencing proceedings what I've marked as Defendant's Exhibits 6 and 7. Tender a copy to counsel. I do not believe that there will be any objection to them.

(Instruments handed to Mills.)

MR. MILLS: If you're representing this was a supervisory agreement that was entered into --

MR. HAYNES: Yes, sir.

MR. MILLS: -- I have no objection to it.

THE COURT: Without objection, those exhibits are admitted into evidence for purposes of this hearing.

MR. HAYNES: Essentially, what they are, Your Honor, are the 17th of June, 1986, supervisory agreement entered into by and between the Lamar Savings Association and the FSLIC.

And the point -- that's Defendant's Exhibit 6. And Defendant's Exhibit 7 is the implementation agreement of that supervisory agreement.

And the point that I would like to make by offering these exhibits into evidence is that as of the time that the DeSoto property was taken back by Lamar Savings from Mr. Reese, as of that time, all the transactions that Lamar Savings could enter into were supervised and under the control of the FSLIC at the time. That is, that the government's officials were there on

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MOTION FOR CLARIFICATION OF RULE 32 MOTION

COMES NOW, the Defendant, Stanley E. Adams, Jr. through counsel, who pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure files this motion requesting further findings of fact and clarification of the Court's order with respect to the Motion which was previously filed in the instant case asking the Court to make certain revisions to the Defendant's Pre-sentence Investigation Report and in support thereof states as follows:

1. As the Court is aware, pursuant to the Motion to Correct the Pre-sentence Investigation Report filed by the Defendant

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in accordance to the provisions of Rule 32 of the Federal Rules of Criminal Procedure, the Defendant prior to sentencing controverted a significant number of statements contained in the Pre-sentence Investigation Report.

2. At the sentencing hearing held on February 20, 1992, the Court made certain findings of fact with respect to some of the controverted matters but failed to make findings of fact as is required by Federal Rules of Criminal Procedure with respect to a majority of issues that were raised by the Defendant in his Rule 32 Motion.

3. As the Court will recall, during the course of the sentencing hearing held on February 20, 1992 the Court ordered that the Victim Impact Section of the Pre-sentence Investigation Report found on page 7 of the PSI be revised to delete therefrom everything with the exception of the reference to the Remington House Apartment transaction and the reference to the Defendant having settled the restitution amount through the FDIC. (See notes of testimony 2/20/92 at page 19 attached hereto as Exhibit A).

4. As the result of the Court's order, the United States Probation Office has made revisions to the Pre-sentence

Investigation Report amending the Victim Impact Statement as ordered by the Court and also deleting from the Victim Impact Statement the total loss figure of $9,349,579. However, the United States Probation Officer has not further corrected the Pre-sentence Investigation Report with respect to the information contained in the Evaluation Section at page 12 which is a recapitulation of information previously contained in the PSI. Specifically, the offense severity rating of 6 is still based upon the previously deleted $9,349,575 figure and has not been modified to a category 4 severity rating which would be consistent with the $78,750 figure which now appears in the Victim Impact Statement. Additionally, page 12 of the Pre-sentence Investigation Report still reflects the Defendant's parole guidelines as a range of 40-52 months (which is based upon the previously excised figure of $9,349,579) instead of the new guideline range of 12-18 months which should apply based upon the $78,750 figure which the Court ordered be utilized in the Victim Impact Statement.

Therefore, in the interim while the Court is making its decision as to the ruling it will issue concerning the remaining controverted matters in the presentence investigation report,

in order to insure that the Pre-sentence Investigation Report in its entirety be revised to consistently reflect both the spirit and the letter of the Court's prior order, it is requested that this Court issue an order directing the United States Probation Office to further revise the Pre-sentence Investigation Report as follows:

a. At page 12 of the Pre-sentence Investigation Report in the Sentencing Data Section it is requested that the Court order that the offense severity rating for the Defendant's case be changed from Category 6 to Category 4 in order to be consistent with the Court's previous finding of $78,750 in damages resulting from the Defendant's participation in the instant offense.

b. At page 12 of the Pre-sentence Investigation Report under the Sentencing Data Section, it is requested that the Court order the United States Probation Office to revise the Pre-sentence Investigation Report to change the guidelines for United States Parole Commission purposes from the 40 to 52 month range currently indicated in the Pre-sentence Investigation Report to 12 to 18 months to be consistent with the Defendant's revised severity rating of 4

and correct salient factor score of 10.

Respectfully Submitted,

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State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the ____ day of March, 1992.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CRIMINAL NO. A-90-CR-117(1)

GOVERNMENT'S RESPONSE TO DEFENDANTS
RULE 32 CLARIFICATION MOTION

Comes now the United States and urges a revision of the Pre-Sentencing Investigation. The United States would urge that Defendant Adams is attempting to dupe the court as the court once stated had been done to Vijay Parekh by Defendant Adams. By urging that there is no loss to Lamar Savings, as Defendant Adams claims, Defendant Adams makes false factual assertions that require a rejoinder as contemplated by the last sentence of paragraph four of the plea agreement.

The United States is aware that the court knows that

co-conspirators are liable and culpable for the acts of their co-conspirators. Pinkerton v. United States, 328 U.S. 640 (1946). As Defendant Adams pleaded guilty to the conspiracy charge of the indictment, he became culpable for all foreseeable acts of his co-conspirators, including those committed by Coleman and Perry. As the court is aware, the jury convicted on three loan transactions which included the Parklane loan, the Remington House loan, and the DeSoto (Ponderosa & Witte) loans. Defendant Adams' signature appears on all loan approval sheets for these loans which involved the misapplication (according to a jury verdict) of approximately $80,000,000.00 of federally insured funds. The court should also remember that the $54,000,000.00 DeSoto loan was the product of the Raddison group, a company consisting of Bill Benton who was a close personal friend of Defendant Adams. Testimony from Lee Horton, one of the Raddison partners, indicated meeting with Defendant Adams regarding the placing of loans and need to remove scheduled items. After this meeting, Horton approached Defendant Reese and the DeSoto loans were structured. Clearly, Adams is responsible as a co-conspirator as the court is aware

based upon Adams' management and control of Lamar Savings and his involvement by approving all the loans that were found to be misapplication of bank funds.

Defendant Adams attempts to have the court participate in a "sham" pre-sentence report in an effort to dupe the Parole Commission by including numerical indices relating to restitution that do not completely indicate the true magnitude of Defendant Adams' criminal conduct. A complete and truthful report would indicate Defendant Adams was not required to make restitution of $9.3 million (DeSoto loan, finding of the court in reference to Reese, Perry and Coleman) due only to the fact that Defendant Adams settled a civil lawsuit in which he paid the Federal Deposit Insurance Corporation (FDIC) approximately $7,000,000.00 and in exchange obtained a release from the FDIC as to all claims the FDIC may have had against Defendant Adams and his family. Defendant Adams will argue he was not convicted of the DeSoto loan transaction, but Defendant Perry was found to be responsible for restitution on the DeSoto loan (even though he had not been convicted of misapplying or making false entries relative to those counts in the indictment) as the

court correctly held Perry culpable and liable under Pinkerton, supra.

A complete and truthful Pre-Sentence Investigation should contain the whole truth and include for severity rating purposes that Defendant Adams, as a co-conspirator, plead guilty to a conspiracy charge that involved the misapplication of $80,000,000.00. This would be in accord with United States v. Cockerham, 919 F.2d 286, 289 (5th Cir. 1990). In Cockerham, the court found "loss to the victim" to be the value of the property taken and to include the value of all property taken, even that recovered or returned. Thus, the "loss" was the $80,000,000.00 misapplied, not the restitution being urged by Defendant Adams which is identical to the argument rejected in Cockerham.

Therefore, the United States urges the Pre-sentence Investigation be amended to show a $80,000,000.00 misapplication/loss with no restitution required due to Defendant Adams' compromise and settlement of a civil law suit with the FDIC where the FDIC was paid approximately $7,000,000.00

The truth, the whole truth, and nothing but the truth

should be included in the Pre-Sentence Investigation.

Respectfully Submitted,

DONALD F. EDERER
United States Attorney

DAN H. MILLS
Assistant U.S. Attorney
816 Congress Ave.
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A/C 512/482-5858
State Bar No. 14152500

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Government's response has been sent by United States Mail on this the 18th day of March, 1992, to:

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701

DAN H. MILLS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CRIMINAL NO. A-90-CR-117(1)

ORDER

Came on to be considered Defendant Adams' Motion for Clarification of Rule 32 Motion and the court having considered said motion and the response of the Government, hereby

ORDERS the Defendant Adams' motion should be DENIED.

SIGNED and ENTERED this _____ day of _____, 1992.

Date: _____

_____
UNITED STATES DISTRICT JUDGE

TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S RULE 32 CLARIFICATION MOTION

Comes now the Defendant, Stanley E. Adams, Jr. through counsel, who submits his reply to the Government's response to his Motion for Clarification of Rule 32 Motion and states as follows:

1. In considering this reply to the Government's response to the Defendant's motion, counsel for the Defendant would respectfully urge the Court to consider the language contained in paragraph 4 of the Defendant's plea agreement which specifically states in part as follows:

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> "The United States Attorney for the Western District of Texas agrees that it will not speak at sentencing regarding any recommendation as to what sentence, fine or other matters should be imposed by the Court. . . .The agreement to remain silent as to sentencing recommendations includes, but is not limited to the type of sentence under 18 USC Section 4205, or the severity rating dollar factor. The United States Attorney for the Western District represents that there is no restitution due and owing to the FDIC due to their settlement in the civil case with Defendant Adams and his family. The United States understands that Defendant Adams will urge the Court, the Probation Department, and the Parole Commission to consider the evidence in the current case the same as that found by the Court in its order in Cause No. A-89-CR-147. The Defendant will assert that as shown in the findings Court's order of May 31, 1990 in Cause No. A-89-CR-147 that "there was no loss to Lamar Savings as a result of this (Remington) loan transaction" in regard to the dollar factor for severity rating as that term is used by the United States Parole Commission or for any other purposes."

It is the Defendant's position that just as occurred during the course of the sentencing hearing when AUSA Mills attempted to dupe the Court into inserting into the PSI additional dollar factors beyond that which was stipulated in the plea agreement with the Defendant (see notes of testimony 2/20/92 at page 13 and 14) that counsel for the Government has <u>again</u> violated the terms of the Defendant's plea agreement as the result of the inaccurate and erroneous

allegations made in the Government's reply to the Defendant's motion. The record in the instant case clearly indicates that it was specifically agreed at the time of the Defendant's entering his plea of guilty and spelled out in the plea agreement that the United States understood that the Defendant would urge the Court, Probation Office and the Parole Commission to consider the evidence in the current case to be the same as that found by the Court in its Order in Cause No. A-89-CR-147. Additionally the Defendant's motion to clarify the Court's findings with respect to its Rule 32 Motion is simply asking the Court to order that the Pre-sentence Investigation Report be ordered to be changed throughout the document to be consistent with the findings already made by the Court on the record.

For the Government to now argue that there were significant losses to Lamar Savings that should be inserted into the PSI and to allege that the Defendant is "attempting to dupe the Court" and to have the Court participate in what the Government characterizes as a "sham" pre-sentence report in an effort to dupe the Parole Commission" not only is an insult to the findings previously made by the Court but a clear

violation of the terms of the Defendant's plea agreement.

2. The government entered into a plea agreement with the Defendant upon which the Defendant relied when he agreed to enter his plea of guilty in the instant case in which the Government clearly understood that it was the Defendant's position that for purposes of determining the Defendant's parole guidelines by the United States Parole Commission that the only dollar factor involved would be the $78,500 loss alleged in the Remington House transaction. Additionally the Government was clearly aware that it agreed with the Defendant that there was no loss to Lamar Savings as a result of the Remington loan transaction.

For the government to now attempt to circumvent and render invalid for Parole Commission consideration purposes the findings of fact previously made by this Court pursuant to Rule 32 of the Federal Rules of Criminal Procedure and for the government to attempt to render the promises made to the Defendant in the course of his plea negotiations to be meaningless not only constitutes bad faith on the part of the United States but further indicates the continuing vendetta which the United States is maintaining against the Defendant

notwithstanding the agreement which the United States entered into which it now seeks to ignore.

WHEREFORE, in view of the foregoing and the Memorandum of law appended hereto, the Defendant would respectfully move that the Court deny the government's request that the Pre-sentence Investigation Report be amended to show a $80,000,000 misapplication/loss figure and would renew its request that the Court issue an order as requested in the Defendant's Motion for Clarification amending page 12 of the Pre-sentence Investigation Report in order that the Pre-sentence Investigation Report throughout be consistent with the findings of fact previously made by the Court on February 20, 1992.

Respectfully Submitted,

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ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the _____ day of March, 1992.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE
TO DEFENDANT'S MOTION FOR CLARIFICATION

As the record in the instant case reflects, the Defendant, pursuant to a previously filed motion which was submitted in accordance with the provisions of Rule 32 of the Federal Rules of Criminal Procedure has asked the Court to make certain additional clarifications to the Pre-sentence Investigation Report in order to insure that the Pre-sentence Investigation Report throughout the document contains statements which are consistent with the findings of fact made by the Court on February 20, 1992 prior to the Defendant's sentencing with respect to the dollar factor

involved in the instant offense. After having filed the Motion for Clarification, the government responded urging the Court to include additional dollar factors in the Defendant's Pre-sentence Investigation Report which are totally inconsistent with the findings of fact made by the Court. Additionally, the Government in its response has alleged that the Defendant is asking the Court to participate in the preparation of a "sham" pre-sentence report in "an effort to dupe the Parole Commission" by including information in the Pre-sentence Investigation Report that did not "completely indicate the true magnitude of Defendant Adams' criminal conduct." The United States has also asked the Court in its reply to the Defendant's motion to amend the Pre-sentence Investigation Report to show a dollar factor of $80,000,000 as opposed to the $78,500 figure set forth in the Pre-sentence Investigation Report and determined by the Court prior to sentencing to be the appropriate dollar loss figure.

It is the Defendant's position that not only are these allegations by the government erroneous but they also are contrary to and in violation of the spirit of the letter of the Defendant's plea agreement which clearly set forth that the

United States agreed that the dollar factor for Parole Commission guideline purposes would be the loss involved in the Remington House transaction ($78,500) and that there was no loss to Lamar Savings as a result of the Remington loan transaction to which the Defendant pled guilty.

In the civil arena it has long been established that "the trial court has power to summarily enforce on a settlement agreement entered into by the litigants while the litigation is pending before it." Autera v. Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969). These long-accepted principles of civil litigation have been given increasing recognition recently in the criminal context as the courts have come explicitly to recognize and encourage the "plea bargaining process". The Supreme Court first dealt with the issue in Santobello v. New York, 404 U.S. 257 (1971), where it held that due process entitles a defendant to relief when the state breaches a promise made to him in exchange for a guilty plea. The Santobello case has evolved over a decade in all circuits so as to become synonymous with the concept of adjudicating disputes over broken plea agreements. It is now Hornbook Law that plea agreements are contracts and that each

agreement stands on its own upon the facts in each case, and that defendants are entitled to what is reasonably due them under specific performance based upon the circumstances of the government's promise and its breach of the terms.

In the instant case, Defendant has clearly demonstrated that not only was he promised in his plea agreement that the government would agree to the dollar factors stipulated with respect to the Remington House transaction but that also the government would remain silent with respect to matters relating to the urging of the Defendant to establish a $78,500 factor for severity rating purposes with the United States Parole Commission. The Defendant has shown reliance upon these promises made by the government. He has upheld his end of the bargain by entering his plea of guilty and providing cooperation to numerous jurisdictions throughout the United States. Accordingly, the Defendant would respectfully ask the Court to insure that the promises made in his plea agreement are enforced.

The Defendant would refer this Court to Cooper v.

United States, 594 F.2d 12 (CA 4 1979) at page 17:

> "Conduct by government prosecutors that in the market place would constitute breach of contract or give rise to promissory estoppel will practically always reflect constitutionally unfair conduct in transactions between sovereign and citizens in matters of liberty and punishment."

In the instant case, not only has the Defendant entered his plea of guilty but, true to his promises made in the plea agreement has been cooperating fully with federal authorities and numerous federal jurisdictions concerning investigation about which he had knowledge.

The Fifth Circuit Court of Appeals in the case of Roe v. Griffin, 676 F.2d 490 (1981) compared the plea bargaining rights of a defendant under Santobello where a defendant "a due process right to enforcement of the bargain" to promises made by the government of immunity from prosecution. At page 496, the court stated:

> "When such a promise induces a defendant to waive his Fifth Amendment rights...to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise must be fulfilled. We hold that once a defendant's good faith compliance with the terms of the agreement is established, the state must perform on its side and any attempts to breach the agreement is per se, a bad faith prosecution."

In United States v. Mooney, 654 F.2d 482 (CA 7 1981) the court stated, "A plea bargain is a contract; the terms of which must necessarily be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the government's conduct relating to its obligations in the case."

In the instant case, the Defendant's plea rested upon and was induced by the government's promises with respect to the dollar factor that would be utilized for parole guidelines purposes and he clearly relied upon this promise in pleading guilty as well as in providing further cooperation to federal authorities.

In United States v. Baylin, 696 F.2d 1030 (CA 3 1982) the court states, "And we urge the government to make every effort to draft unambiguous plea agreements." Also see: United States v. Cook, 669 F.2d 317 (CA 7 1987), "The government may not rely upon favorable judicial construction to cure significant ambiguities in its plea agreements. Plea agreements need to be carefully drawn and understood by all parties."

The courts have held that where the plea agreement is reasonably understood by the defendant to provide certain promises which are not fulfilled, that the defendant is denied due process. In United States v. Crusco, 536 F.2d 21 (CA 3 1976) the court states, at page 27: "The government may reach the port in the plea bargaining process, but founder there because of careless or loose language in its commitment." In its decision the court further states that where "circumstances as they existed at the time of the guilty plea judged by objective standards, reasonably justified his mistaken impression" the defendant may be held to have entered his plea without full knowledge of the consequences and involuntarily.

In United States v. Roberts, 570 F.2d 999 (1066) (CA D.C. 1979) the court states: "The government will not be allowed to avoid the obligation it incurred claiming now that the language literally promises nothing to the defendant. A plea agreement is not an appropriate context for the government to resort to a rigidly literal approach in construction of language."

The Defendant would also refer the Court to the case

of Lockhart v. Holiday Homes, 678 F.2d 1176 (1982) in footnote 8, at page 1185 where the court states that in interpreting the terms of a contract, the test is: "the common usage of other men in like circumstances. Or, what would a reasonable man in the same circumstances understand?"

In the case of United States v. Robertson, 582 F.2d 1356 (1978) the court held that the accused's state of mind is critical in determining the court's interpretation and enforcement of a plea agreement. The court then established the following two-tiered test:

a) Whether the accused exhibited an actual subjective expectation to negotiate a plea;

b) Whether the accused's perception of the negotiations and discussions was reasonable under the circumstances.

The Defendant clearly meets this test on both points. Based upon the fact that he has continued to provide full cooperation to the United States in numerous jurisdictions throughout the United States, Defendant would submit that the government cannot have it both ways - inducing him on the one hand to cooperate multi-jurisdictionally while, on the

other hand, going against the terms of his plea agreement by urging the Court to make significant modifications in the Pre-sentence Investigation Report which will have major adverse effects upon him with respect to his efforts to obtain release on parole - especially in view of the fact that the Court has sentenced him pursuant to the provisions of Title 18 USC Section 4205(b)(2). Were the Court to permit the government to be successful in its latest endeavors in this regard, it would certainly render the terms of his plea agreement and the promises made to the Defendant in order to induce his plea of guilty meaningless.

The case of United States v. Herman, 544 F.2d 791 (CA 5 1977) at page 797, very aptly describes the conduct of the government in the instant case where the court states:

> "If Congress had wanted plea bargaining to be formalized or structured, the rules could have been so provided. But Congress, believing that plea bargaining is a necessary ingredient in the criminal process, wanted an accused freely to discuss his or her plight. Congress did not intend that the accused by convicted out of the bargaining words Congress had encouraged him or her to utter. We cannot ascribe to Congress any intention to sand bag an accused in his or her plea bargaining sessions. The government, as one of the dancing partners, should not be able to lead its partner to a trap door in the dance floor."

(Emphasis added)

The Defendant has confessed his culpability in the instant case and has cooperated fully during the past three months in good faith. He has never stopped cooperating with the government and he continues to stand ready, willing and able to continue to do so. As of the filing of this pleading, he currently has scheduled with the Federal Bureau of Investigation from Dallas, Texas a debriefing for April 8, 1992 and additionally has scheduled with the Federal Bank Task Force in Dallas the first of what is believed to be a number of ongoing debriefings commencing on Monday, March 30, 1992.

In view of the foregoing, the Defendant would respectfully request the Court to grant his motion with respect to further clarification of his Pre-sentence Investigation Report and to deny the government's request for further additions to be made to the Pre-sentence Investigation Report of erroneous, prejudicial information in order to insure that the promises made by the government in its plea agreement upon which he relied in entering his plea of guilty and in providing his cooperation are kept.

Respectfully Submitted,

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State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

CRIMINAL NO. A-90-CR-117(1)

ORDER

Before the Court is the Defendant Adams' Motion for Clarification of Rule 32 Motion, filed March 13, 1992. Having reviewed and considered this motion and the Government's response and the Defendant's response to the Government response, the Court is of the opinion that the motion should be DENIED.

It is ORDERED that Defendant Adams' Motion for Clarification of Rule 32 Motion, filed March 13, 1992 is hereby

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DENIED.

SIGNED AND ENTERED this 16th Day of April, 1992

James R. Nowlin
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

SUPPLEMENT TO MOTION TO CORRECT PRE-SENTENCE INVESTIGATION REPORT

TO THE HONORABLE JUDGE JAMES R. NOWLIN:

COMES NOW the Defendant, Stanley E. Adams, Jr., through counsel, and pursuant to Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, files a supplement to the Motion to Correct Pre-sentence Investigation Report which was filed on February 14, 1992 and is currently pending before the Court and in support thereof states as follows:

1. As the record in the instant case reflects, after receiving the Pre-sentence Investigation Report and reviewing it with counsel, the Defendant outlined to counsel numerous

areas of the Pre-sentence Investigation Report which he controverted as being erroneous and without any basis in fact. Counsel then attempted to informally resolve these objections with the United States Probation Office and after being unsuccessful in attempting to do so, on February 14, 1992 filed a motion to correct pre-sentence investigation report in which seventeen objections were raised with respect to the contents of the Pre-sentence Investigation Report.

2. At the sentencing hearing held on February 20, 1992, the Court made findings of fact with respect to only several of the objections listed in the Defendant's Rule 32 Motion but neglected to make findings of fact concerning the remaining balance of said objections.

3. As a result of the findings of fact made by the Court prior to sentencing, the United States Probation Office did make certain revisions to page 7 of the Pre-sentence Investigation Report but made no further modifications of any other portion of the Pre-sentence Investigation Report.

4. Accordingly, on March 13, 1992, the Defendant filed through counsel a pleading entitled Motion for Clarification of Rule 32 Motion, in which the Court was asked to order the

United States Probation Office to make further changes on page 12 of the Pre-sentence Investigation Report to render said report consistent with the changes made by the United States Probation office on page 7 of the Pre-sentence Investigation Report.

5. On April 6, 1992, the Court issued its order denying the Defendant's Motion for Clarification of Rule 32. However, the Court failed to issue any further rulings with respect to the Motion for Modification of Sentence previously filed on February 14, 1992 and the numerous additional objections to the Pre-sentence Investigation Report which is still pending before the Court.

6. On April 13, 1992, the Court issued an Order directing the Defendant to surrender himself and begin serving his sentence at the place and time designated by the Federal Bureau of Prisons. Since the issuance of the aforementioned order on April 13, 1992, the Defendant's counsel has been advised that the Defendant has been designated to a federal prison institution at Texarkana, Texas and the Defendant is to report on April 29, 1992.

7. As a result of the foregoing, and in order to be able to

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

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receive due process in his efforts to obtain parole with the United States Parole Commission, the Defendant files this Supplemental Motion to his Original Motion to Correct Pre-sentence Investigation Report. The Court will recall that at the time of the Defendant's sentencing, the Court made a finding of fact as to the dollar amount involve din the offense for parole guideline purposes as being $78,500. Notwithstanding this fact, there are numerous other statements contained in the Pre-sentence Investigation Report which to this date have not been addressed by the Court as required by Federal Rules of Criminal Procedure, Rule 32 and which, if relied upon by the United States Parole Commission, very possibly could result in the imposition by the United States Parole Commission upon the Defendant of much greater parole guidelines than otherwise would be the case were the United States Parole Commission to rely upon the Court's finding of $78,500. Accordingly, the Defendant would submit that, in view of the fact that the Court has not yet held an evidentiary hearing with respect to those matters, that it is totally appropriate for the Court, in accordance with the provisions of Rule 32 of the Federal Rules of Criminal Procedure, to now

make ruling with respect to those other objections to the Pre-sentence Investigation Report which are still outstanding in order that the Pre-sentence Investigation Report can be finalized.

8. Additionally, as the Court is aware, pursuant to the Defendant's plea agreement, the United States agreed to remain silent at sentencing with respect to the issue of the severity rating dollar factor for parole guideline purposes to be utilized by the United States Parole Commission. The plea agreement in paragraph 4 specifically sets forth that the United States understood that the Defendant would urge the Court, the Probation Department, and the United States Parole Commission to accept an amount precisely the same as that found by the Court in its order in Cause No. A-89-CR-147. Notwithstanding this fact, the United States has continued to attempt to breach the promises made to the Defendant in its plea agreement by causing the FDIC to provide two separate letters to the Court which attempt to raise the dollar factor involved for parole guideline purposes beyond the $78,500 figure previously ordered by the Court. Additionally, as the Court is also aware, in the government's

response to the previously ruled upon Motion for Clarification, the government even went so far as to ask the Court to amend the Pre-sentence Investigation Report to show a $80,000,000 loss figure - gain in violation of the Defendant's plea agreement. In view of the foregoing, the Defendant would ask the Court to issue an order to the office of the United States Attorney and any other agencies of the United States government to cease and desist from further attempts to distort the Records of the Bureau of Prisons and the United States Parole Commission by forwarding to either the United States Parole Commission or the Federal Bureau of Prisons any additional information or documentation which is contrary to the Court's findings of fact that the dollar amount involved in the Defendant's offense was $78,500.

WHEREFORE, for the foregoing reasons, it is respectfully prayed that an Order be issued striking and redacting each of the remaining disputed sections of the Pre-sentence Investigation Report from the text of the report in order that said information will not adversely effect the Defendant in his efforts to obtain due process with the United States Parole Commission and with the Federal Bureau of

Prisons. It is also respectfully prayed that an Order be issued directing the United States Attorney and any other government agency to cease and desist from forwarding any other materials to the Federal Bureau of Prisons or the United States Parole Commission which may be inconsistent with the findings of fact made by the Court on February 20, 1992, concerning the dollar factor involved in the Defendant's offense for parole guidelines purposes and in violation of his plea agreement.

Respectfully Submitted,

_____

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Facsimile No. (512) 478-2044
State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 24th day of April, 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

ORDER

Came on to be heard the Supplement to Motion to Correct Pre-sentence Investigation Report, and the Court having considered the motion and the Government's response thereto, finds that the motion does have merit, and it is hereby GRANTED.

It is hereby ORDERED that each of the remaining disputed sections of the Pre-sentence Investigation Report be stricken from the text of the report.

It is FURTHER ORDERED that the United States Attorney and any other government agency cease and desist from forwarding any other materials to the Federal Bureau of

Prisons or the United States Parole Commission which are inconsistent with the findings of fact made by this Court on February 20, 1992 concerning the dollar factor involved in the Defendant's offense.

SIGNED AND ORDERED on this _____ day of _____, 1992.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL MOTION TO CORRECT PRE-SENTENCE INVESTIGATION REPORT

Federal Rule of Criminal Procedure 32 provides in pertinent part:

(c) Pre-sentence Investigation

> (c)(D) If comments of the Defendant and his counsel, or testimony or other information introduced by them allege any factual inaccuracy in the Pre-sentence Investigation Report or the Summary of the Report or part thereof, the Court shall, as to each matter controverted make (i) a finding as to the allegation or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account at sentencing. A written record of such findings and determination shall be appended to and accompany and copy of the Pre-sentence Investigation Report hereafter made available to

the Bureau of Prisons or Parole Commission.

In the instant case, the record is clear that the Court has thus far failed to comply with the requirements of Rule 32(c)(3)(D) in that it has failed to make findings of fact as to each and very matter disputed by the Defendant on the record prior to sentencing. It is the Defendant's position that he is entitled to such findings of fact once an evidentiary hearing has been held in order that the Court can determine the accuracy of the information to which the Defendant objects. It is further the Defendant's position that if said controverted matters are not corrected, that his due process rights with the United States Parole Commission may be significantly adversely affected in that the United States Parole Commission may be left to rely upon erroneous statements and inaccurate information which is still contained in the Pre-sentence Investigation Report in determining his parole guidelines.

In United States v. Velasquez, 748 F.2d 972, 974 (5th Cir. 1984), the Fifth Circuit expressly recognized the effect of an erroneous Pre-sentence Investigation Report beyond the impact on the sentencing judge. In this case, the court of

appeals for the Fifth Circuit found that the district court failed to comply with the procedural requirements of sentencing as set forth in Rule 32 of the Federal Rules of Criminal Procedure and ordered a new sentencing hearing. The Defendant would submit that the Velasquez decision removes any doubt that the District Court must response to a Defendant's objections to the Pre-sentence Investigation Report.

In this case at the Pre-sentencing Hearing, the District Court asked Velasquez whether there were any errors in the Pre-sentence Investigation Report. Velasquez's attorney objected to the label "notorious alien smuggler" used in the Pre-sentence Investigation Report to describe Velasquez. The District Court did not respond to the objection. In its decision in which it vacated Velasquez's sentence, the Court of Appeals held that the District Court violated procedural rules in imposing sentence where it did not respond to the objection to the label of "notorious alien smuggler" used in the Pre-sentence Investigation Report to describe the Defendant and held that this required reversal and a remand for resentencing.

The Defendant would also refer the Court to the case

of United States v. Eschweiler, 782 F.2d 1385 (7th Cir. 1986) at page 1388 where the Court of Appeals held that:

> If the defendant disputes a fact in the record, the requirements of subsection (D) are triggered...the sentencing judge is then obligated then either to make written findings concerning the disputed matter or a written determination that the disputed matter will not be relied on for sentencing and then attach it to the presentence report.

Accord U.S. v. Serino 835 F.2d 931 (1st Cir. 1987); U.S. v. Arefi, 847 F.2d 1003 (2nd Cir. 1988); U.S. v. Manni, 810 F.2d 80 (6th Cir. 1987); U.S. v. Peterman, 841 F.2d 1474 (10th Cir. 1988).

The purpose of Rule 32(c)(3)(D) are set out in United States v. Lawal, 810 F.2d 491 (5th Cir. 1987) in which the court stated at page 493:

> The rule serves two important functions:
>
> (1) It ensures that a defendant receives a fair sentence based on accurate information, and
>
> (2) it ensures that a clear record of the resolution of disputed facts is available.

Accord U.S. v. Garcia, 821 F.2d 1052 (5th Cir. 1987). Also see United States v. Hutador, 856 F.2d 995 (5th Cir. 1988).

As set forth in the Memorandum in Support of the

Defendant's Motion to Correct Pre-sentence Investigation Report, it is the Defendant's position that once a clear and specific objection to materially inaccurate information in the Pre-sentence Investigation Report is registered, the Government bears the burden of proof and production in substantiating the disputed pre-sentence investigation report allegations, at a minimum by the preponderance of the evidence. See McMillan v. Pennsylvania, 477 U.S. 79, (1986). Additionally, as set forth above since the Defendant has raised allegations concerning disputed information in the pre-sentence investigation report, the requirements of Federal Rules of Criminal Procedure 32(c)(3)(D) are triggered and the Court is required to comply therewith. To permit the Report to remain tainted by conclusory and factually unsupported allegations, the Defendant's efforts to be released on parole clearly will be frustrated and will result in grave injustice to the one process right of the Defendant.

Respectfully Submitted,

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State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 24th day of April, 1992.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

ORDER

This matter is before the Court as the result of a Motion filed by counsel for the Defendant in the instant case pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure in which counsel asks the Court to make certain corrections to the Defendant's PSI. After consideration of the motion filed by counsel for the Defendant as well as conducting an evidentiary hearing in respect thereof, the Court at the Defendant's sentencing hearing held on February 20, 1992 ordered that certain modifications be made to the Pre-sentence Investigation Report.

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At that time the Court ordered that all statements relative to the DeSoto (Witte and Ponderosa) property as well as the Parklane Apartments Project be deleted from the Victim Impact statement found on page 7 of the Pre-sentence Investigation Report. The Court also ordered that with respect to page 8 of the Victim Impact Statement, the language involving the total loss resulting from the conspiracy being $9,349,579 be deleted from the Pre-sentence Investigation Report. Further, with respect to the Remington House Apartment Project, the Court further found that the loss incurred as the result of the Defendant's participation in that transaction was in the amount of $78,750.

After further review of the revisions made by the United States Probation Office to the Defendant's Pre-sentence Investigation Report which have been made pursuant to the Court's order of February 20, 1992, and in order to insure that the Pre-sentence Investigation Report is revised in all respect to be consistent with the Court's previous findings,

It is HEREBY ORDERED that the Pre-sentence Investigation Report be further revised as follows:

1. At page 12 in the Evaluation Section, second paragraph, the Court orders that the last two sentences of the second paragraph be deleted.

2. Under the Sentencing Data Section of the Pre-sentence Investigation Report at page 12, the Court orders that the offense severity rating for the Defendant's case be changed from 6 to a category 4 in order to be consistent with the Court's previous finding of $78,750 in damages resulting form the Defendant's participation in the instant case.

3. Additionally at page 12 of the Pre-sentence Investigation Report under the Sentencing Data Section the Court orders that the guidelines for United States Parole Commission purposes be modified from 40 to 52 months to 12 to 18 months to be consistent with the Defendant's revised severity rating of 4 and correct salient factor score of 10.

Done and Ordered in Chambers in the United States Courthouse, Austin, Texas this _____ of March, 1992.

_____
James R. Nowlin
United States District Judge